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Gerhard Reichart v Fenny Leong Chen Fong

B HIGH COURT (TAWAU) — DIVORCE PETITION NO TWU-33–12/9 OF 2017
ALWI ABDUL WAHAB J
9 NOVEMBER 2018

C *Family Law — Divorce — Petition — Custody of child upon dissolution of marriage — Interests of child — Whether custody should be given to petitioner — Matrimonial properties — Whether matrimonial properties should be given to petitioner*

D The husband petitioner by way of petition dated 21 September 2017 supported by his affidavit affirmed on 20 September 2017 prayed from the court for the dissolution of his marriage with the wife respondent, the joint custody of the children of the marriage, monthly maintenance and the division
E of the matrimonial properties and assets acquired during their marriage. The wife respondent contested the petition and filed her answer to the petition. Both the husband petitioner and the wife respondent agreed that their marriage was dissolved. The remaining issues were namely: (a) custody of the two children of the marriage; and (b) division of the matrimonial assets. For the
F division of the matrimonial assets, the husband petitioner claimed for the division of the properties listed in the petition which the husband petitioner contended that they were matrimonial assets of the family. The highly contentious matrimonial assets which the husband sought for an order for the same to be transferred and assigned to him were: (i) 1/2 undivided share in the
G matrimonial house described as one unit of semi-detached fully renovated house situated at TB 468, Taman Suria, Jalan Salleh, 91000 Tawau; (ii) 1/2 undivided share in one unit of double storey shop/office known as Lot B7, Semporna Seafront Resort Township, Semporna; (iii) 1/2 undivided share in one unit of double storey shop/office known as Lot B8, Semporna Seafront
H Resort Township, Semporna; and (iv) all the wife respondent's shareholdings in the business of North Borneo Dive & Sea Sports Sdn Bhd ('the company') with the respondent's resignation as director of the company.

Held:

I (1) Both the children aged 17 and 15 years old at the time of the presentation of the divorce petition. They were grown up adult and capable of expressing their independent opinion as to what was good and bad for them. During an interview conducted by the court, both the children had indicated to the judge that they were comfortable staying with the

respondent wife. Upon placing the utmost consideration to the childrens welfare, the sole custody of the children was given to the wife respondent with unlimited access to the husband petitioner. It was for the best interest and welfare of the children if they were to remain under the care, custody and control of the wife respondent and continue to occupy and reside at the matrimonial home at Taman Suria, Tawau (see paras 8–9).

(2) In respect of the matrimonial home at Taman Suria, both the husband petitioner and the wife respondent had failed to adduce sufficient evidence to support their claim that each one of them had made a greater contribution towards the purchase of the house than the other. By taking into account the welfare of the children, the court ordered both the husband petitioner and wife respondent to transfer their 1/2 undivided shares each in the matrimonial house at Taman Suria to the children of the family. As the wife respondent was given the care and sole custody of the children, it would only be fair if she was allowed to remain in the house subject to the agreement of the children (see paras 31 & 35).

(3) In respect of the properties in Lots B7 and B8, the husband petitioner had a legitimate expectation on his right and interest over the properties when he was registered as the co-owner of the properties and entrusted by the wife respondent to manage the business of the companies especially the North Borneo Dive & Sea Sports Sdn Bhd. He had performed his duties based on his expertise towards the development of the company which led to the purchase of more properties generated from its profits and incomes. The court allowed the division of the properties in Lots B7 and B8 in proportion 40% for the husband petitioner and 60% for the wife respondent. As the properties were still under the loan facility, the just and equitable order would be for these properties to be sold and the proceeds to be divided equally. The greater proportion was given to the wife respondent in the interest of the children of the family as the wife would be solely responsible to provide for the maintenance of the children (see paras 42 & 45).

(4) The court was aware that one Dr Irwan Soo had a share in the business of the company North Borneo Dive & Sea Sports Sdn Bhd. However, the share of the business should not be mixed up with the ownership of the premises. As such, the court maintained the earlier order that Lots B7 and B8 should be divided in the proportion of 60% and 40% between the wife respondent and the husband petitioner respectively. This was fortified by the court's oral ruling that prior to the sale of Lots B7 and B8, the husband petitioner shall keep his 30% shares in the business share of North Borneo Dive & Sea Sports Sdn Bhd, the wife respondent shall keep 60% business shares and Dr Irwan Soo shall keep the remaining 10% of the shares (see paras 49–50).

(5) The court dismissed the claim of maintenance by the husband petitioner as the husband petitioner was capable of maintaining and supporting himself as it was proven that he was currently managing his own company, Mawali Adventure. In any event, learned counsel for the husband petitioner did not submit widely on the issue of maintenance (see para 51).

[Bahasa Malaysia summary

Pempetisyen suami melalui petisyen bertarikh 21 September 2017 yang disokong oleh afidavitnya yang disahkan pada 20 September 2017 memohon kepada mahkamah untuk membubarkan perkahwinannya dengan responden isteri, penjagaan bersama anak-anak, nafkah bulanan dan pembahagian harta dan aset perkahwinan yang diperolehi semasa perkahwinan mereka. Responden isteri menentang petisyen tersebut dan memfailkan jawapannya kepada petisyen. Kedua pempetisyen suami dan responden isteri bersetuju bahawa perkahwinan mereka dibubarkan. Isu-isu yang tinggal adalah: (a) penjagaan kedua-dua anak; dan (b) pembahagian aset perkahwinan. Bagi pembahagian aset perkahwinan, pempetisyen suami mendakwa pembahagian harta yang disenaraikan dalam petisyen yang dipohon oleh pempetisyen suami adalah bahawa ianya adalah aset perkahwinan keluarga. Aset perkahwinan yang sangat dipertikaikan yang mana suami memohon untuk perintah yang sama untuk dipindahkan dan diberikan kepadanya adalah: (i) 1/2 bahagian yang tidak berbahagi di rumah perkahwinan yang diperihalkan sebagai satu unit rumah yang telah diubah suai sepenuhnya yang terletak di TB 468, Taman Suria, Jalan Salleh, 91000 Tawau; (ii) 1/2 bahagian yang tidak berbahagi di satu unit kedai/pejabat dua tingkat yang dikenali sebagai Lot B7, Semporna Seafront Resort Township, Semporna; (iii) 1/2 bahagian yang tidak berbahagi di satu unit kedai/pejabat dua tingkat yang dikenali sebagai Lot B8, Semporna Seafront Resort Township, Semporna; dan (iv) semua pegangan saham responden isteri dalam perniagaan North Borneo Dive & Sea Sports Sdn Bhd ('syarikat') dengan peletakan jawatan responden sebagai pengarah syarikat.

Diputuskan:

(1) Kedua-dua anak-anak berumur 17 dan 15 tahun pada masa penyampaian petisyen perceraian. Mereka adalah orang dewasa dan mampu menyatakan pendapat bebas mereka tentang apa yang baik dan buruk bagi mereka. Semasa temubual yang dijalankan oleh mahkamah, kedua-dua anak-anak telah menyatakan kepada hakim bahawa mereka selesa tinggal dengan responden isteri. Setelah meletakkan perhatian penuh kepada kebajikan kanak-kanak, hak penjagaan anak tunggal diberikan kepada responden isteri dengan akses tanpa had kepada pempetisyen suami. Ia adalah untuk kepentingan dan kebajikan anak-anak yang terbaik jika mereka kekal di bawah penjagaan, jagaan dan kawalan responden isteri dan terus menduduki dan menetap di rumah

perkahwinan di Taman Suria, Tawau (lihat perenggan 8–9).

(2) Berkenaan dengan rumah perkahwinan di Taman Suria, kedua-dua pempetisyen suami dan responden isteri gagal memberi keterangan yang mencukupi untuk menyokong dakwaan mereka bahawa setiap daripada mereka telah membuat sumbangan yang lebih besar ke arah pembelian rumah daripada yang lain. Dengan mengambil kira kebajikan anak-anak, mahkamah memerintahkan kedua-dua pempetisyen suami dan responden isteri untuk memindahkan 1/2 bahagian yang tidak berbahagi mereka di setiap rumah perkahwinan di Taman Suria kepada anak-anak keluarga. Oleh kerana responden isteri diberi penjagaan dan jagaan tunggal anak-anak, ia hanya adil jika dia dibenarkan tinggal di rumah tertakluk kepada persetujuan anak-anak (lihat perenggan 31 & 35).

(3) Berkenaan dengan harta-harta di Lot B7 dan B8, pempetisyen suami mempunyai jangkaan yang sah atas hak dan kepentingannya terhadap harta tersebut apabila dia didaftarkan sebagai pemilik bersama harta tersebut dan diamanahkan oleh responden isteri untuk menguruskan perniagaan syarikat terutamanya North Borneo Dive & Sea Sports Sdn Bhd. Dia telah melaksanakan tugasnya berdasarkan kepakarannya terhadap pembangunan syarikat yang membawa kepada pembelian lebih banyak harta yang dihasilkan dari keuntungan dan pendapatannya. Mahkamah membenarkan pembahagian harta di Lot B7 dan B8 dengan kadar 40% untuk pempetisyen suami dan 60% untuk responden isteri. Memandangkan harta masih berada di bawah kemudahan pinjaman, perintah yang adil dan saksama adalah untuk harta ini untuk dijual dan hasilnya akan dibahagikan sama rata. Kadar yang lebih besar diberikan kepada responden isteri demi kepentingan anak-anak keluarga kerana isteri akan bertanggungjawab sepenuhnya untuk menyediakan nafkah anak-anak (lihat perenggan 42 & 45).

(4) Mahkamah sedar bahawa seorang Dr Irwan Soo mempunyai bahagian dalam perniagaan syarikat North Borneo Dive & Sea Sports Sdn Bhd. Walau bagaimanapun, bahagian perniagaan itu tidak boleh bercampur dengan pemilikan premis. Oleh itu, mahkamah mengekalkan perintah terdahulu bahawa Lot B7 dan B8 harus dibahagikan dalam nisbah 60% dan 40% antara responden isteri dan pempetisyen suami. Ini diperkuat dengan keputusan lisan mahkamah bahawa sebelum penjualan Lot B7 dan B8, pempetisyen suami hendaklah menyimpan 30% bahagiannya dalam saham perniagaan North Borneo Dive & Sea Sports Sdn Bhd, responden isteri akan menyimpan 60% saham perniagaan dan Dr Irwan Soo akan menyimpan baki 10% saham (lihat perenggan 49–50).

(5) Mahkamah menolak tuntutan nafkah oleh pempetisyen suami kerana pempetisyen suami mampu mengekal dan menyokong dirinya kerana adalah terbukti dia sedang menguruskan perusahaannya sendiri, Mawali Adventure. Dalam apa jua keadaan, peguam yang bijaksana pempetisyen

A suami tidak mengemukakan secara meluas mengenai isu nafkah (lihat perenggan 51).]

Notes

B For cases on petition, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4381–4392.

Cases referred to

Yap Yen Piow v Hee Wee Eng [2017] 1 MLJ 17; [2016] 1 LNS 1060, CA (refd)

C **Legislation referred to**

Law Reform (Marriage and Divorce) Act 1976 s 76(1), (3)

Rosslin Rosen (Ting Rosen & Co) for the petitioner.
Hamid Hamzah Mydin (Amin Jaafar & Co) for the respondent.

D

Alwi Abdul Wahab J:

INTRODUCTION

E **[1]** The husband petitioner by way of petition dated 21 September 2017 (encl 1) supported by his affidavit affirmed on 20 September 2017 (encl 2) prayed from this court for the dissolution of his marriage with the wife respondent, the joint custody of the children of the marriage, monthly maintenance and the division of the matrimonial properties and assets acquired during their marriage.

F

[2] The wife respondent contested the petition and filed her answer to the petition dated 31 October 2017 (encl 8). The wife respondent later filed her amended answer to the petition dated 23 November 2017 (encl 15).

G

[3] The husband petitioner's reply to the amended answer of the wife respondent dated 22 December 2017 is filed under encl 16 (see bundle of pleadings (encl 22)).

H

DISSOLUTION OF THE MARRIAGE

[4] At the outset, both the husband petitioner and the wife respondent agreed that their marriage be dissolved. On that note, I hereby grant such an order as prayed for under prayer 1 of the petition.

I

[5] What is left for my determination is on two issues namely:

(a) custody of the two children of the marriage; and

(b) division of the matrimonial assets.

CUSTODY OF THE CHILDREN OF THE MARRIAGE

[6] Both the children of the marriage aged 17 and 15 years old at the time of the presentation of the divorce petition. Both children are grown up adult and capable of expressing their independent opinion as to what is good and bad for them. In deciding the custody and care of both the children of the marriage, the paramount consideration is the welfare of the children subject of course to the wishes of the parents as well as the wishes of the children.

[7] For that purpose, I have conducted an interview with the children separately on the 12 October 2018. During the interview, both the children have indicated to me that they were comfortable staying with their mother ie the respondent wife and both wished the present arrangement to continue.

[8] Having heard the representation from both the children of the marriage and upon considering the relevant facts and circumstances of the case and upon placing the utmost consideration to the children welfare, the sole custody of the children is given to the wife respondent with unlimited access to the husband petitioner.

[9] It is for the best interest and welfare of the children if they are to remain under the care, custody and control of the wife respondent and continue to occupy and reside at the matrimonial home at Taman Suria, Tawau.

[10] I order accordingly.

DIVISION OF THE MATRIMONIAL ASSETS

[11] The husband petitioner is claiming for the division of the properties listed under paras 11(1)–(15) of the petition which the husband petitioner contends that they are matrimonial assets of the family. Although the husband petitioner is willing to let go his interest over some of the matrimonial assets listed above by only confining his claims to the items in paras 11(1), 11(2), 11(3), 11(14) and 11(15) of the petition, the wife respondent refused to agree with this concession save for the Mitsubishi car under para 11(15) which the wife respondent is willing to surrender to the husband petitioner.

[12] The wife respondent is also prepared to surrender her business share and assets of Holiday Dive Inn Sdn Bhd (para 11(12) of the petition) and her business share and assets in Cocoa Beach Lodge Sdn Bhd (para 11(13) of the petition). Further, she is also prepared to give the property ie 50 acres of TOL land situated at Kg Pantau Pantau, Pulau Bum Bum, District of Semporna

(para 11(11) of the petition) to the husband petitioner.

[13] In respect of the three other properties namely Lots A5, A6 and A7 of Semporna Seafront Resort Township (para 11(4), 11(5) and 11(6) of the petition) where the business of Holiday Dive Inn is being carried out, the wife respondent is prepared to transfer her half share in each of the properties to the children of the marriage.

[14] The highly contentious matrimonial assets which the husband petitioner sought for an order for the same to be transferred and assigned to him are as follows:

(a) 1/2 undivided share in the matrimonial house described as one unit of semi-detached fully renovated house situate at TB 4687, Taman Suria, Jalan Salleh, 91000 Tawau (para 11(1) of the petition);

(b) 1/2 undivided share in one unit of double storey shop/office known as Lot B7, Semporna Seafront Resort Township, Semporna comprised in Master Title No TL 127503502 and TL 127503495, District of Semporna (para 11(2) of the petition);

(c) 1/2 undivided share in one unit of double storey shop/office known as Lot B8, Semporna Seafront Resort Township, Semporna comprised in Master Title No TL 127503502 and 127503495 District of Semporna (para 11(3) of the petition); and

(d) all the wife respondent's shareholdings in the business of North Borneo Dive & Sea Sports Sdn Bhd (Company No 467443-K) with the respondent's resignation as director of the company (para 11(14) of the petition).

[15] The house at Taman Suria, Tawau is the matrimonial home in which the wife respondent and the two children are currently staying in Lots B7 and B8 of Semporna Seafront Resort Township are the business premises for North Borneo Dive & Sea Sports Sdn Bhd.

[16] In deciding whether the husband petitioner is entitled to claim his shares over the alleged matrimonial assets and properties identified above, it is pertinent to examine the evidence given by the husband petitioner and wife respondent in court both orally and documentary.

[17] It was revealed during the trial that there are two other properties in the name of the wife respondent acquired during the subsistence of the marriage namely a property situated at Kg Melinsung, district of Papar and held under subsidiary title No 020520683 and a house situated at Mile 3, Apas Road,

Tawau and held under CL 105336561. These two properties are not listed above in para 11 of the petition.

UNDISPUTED FACTS

[18] It is undisputed facts that both the husband petitioner and wife respondent were married on the 8 August 1998.

[19] The North Borneo Dive & Sea Sports Sdn Bhd was set up barely six days later on the 14 August 1998.

[20] The husband petitioner was employed as the general manager cum diving instructor of North Borneo Dive & Sea Sports Sdn Bhd sometime in September 2009 (exh D7). He was paid a monthly director's income of RM3,000 and enjoyed an unlimited and fully paid living and travelling expenses averaging RM30,000 per month until June 2017.

[21] The husband petitioner is holding 30% shares and the wife respondent is holding 60% shares in North Borneo Dive & Sea Sports Sdn Bhd at the time of the presentation of this divorce petition. The remaining 10% shares of the company is held by the wife respondent's cousin's brother by the name of Dr Irwan Soo.

[22] Prior to joining the North Borneo Dive & Sea Sports Sdn. Bhd, the husband petitioner had been employed by Sentosa Engineering Auto Sdn Bhd as general manager (exhs D5 and D6). It is not, however, clear as to when the date of the commencement of the husband petitioner's employment as it is subject to the necessary visa requirements being met. Exhibit D5 is the husband petitioner's employment contract with Sentosa Engineering Auto Sdn Bhd dated 1 May 2002 and exh d6 is the letter of guarantee of employment dated 12 August 1999.

[23] During the subsistence of the marriage, the matrimonial home at Taman Suria was purchased in 2006 in the joint names of the husband petitioner and wife respondent (exh D3).

[24] Lots B7 and B8, Semporna Seafront Resort Township were also purchased during the subsistence of the marriage in 2008 in the joint names of the husband petitioner and wife respondent.

[25] Likewise, for Lots A5, A6 and A7 of Semporna Seafront Resort Township, all were purchased in the same year ie 2008 in the joint names of the husband petitioner and wife respondent.

A THE COURT'S FINDINGS

[26] In deciding this issue of division of the matrimonial assets of the family, I am guided by the authority of the Court of Appeal in *Yap Yen Piow v Hee Wee Eng* [2017] 1 MLJ 17; [2016] 1 LNS 1060 where the court held that the B phrase 'matrimonial assets' may fall into two categories: (a) the matrimonial property which is acquired under the joint efforts during the subsistence of the marriage provided under s 76(1) of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA'); and (b) non-matrimonial property which is acquired by one party through his/her sole efforts provided under s 76(3) of the LRA 1976. C

[27] There is another category of matrimonial assets ie the properties which were acquired before the marriage by one party but substantially improved during the marriage by the other party or by their joint efforts. This category does not apply in the present matter. D

[28] For the category under the matrimonial property, the court has the obligation to divide the assets as of right depending on the extent of the contributions made by each party in money, property or work towards the E acquiring of the properties. Subject to these considerations, the court would incline towards the equality of division (*Yap Yen Piow*).

[29] For the category under non-matrimonial property the division is not permissible as a matter of right. The court shall have regard to the extent of the F contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family and the needs of the minor children. Subject to those considerations, the court may divide the assets or the proceeds of sale in such proportion as the court thinks reasonable but in any case, the party by whose effort the assets were acquired G shall receive a greater proportion (*Yap Yen Piow*).

[30] Just because the property is acquired during the subsistence of the marriage does not mean that it must be brought to account for the purpose of distribution. The burden will appear to be on the person who alleges that it was H acquired by joint efforts (*Yap Yen Piow*). It is therefore pertinent to look into the evidence before the court.

[31] In respect of the matrimonial home at Taman Suria, I find that both the husband petitioner and the wife respondent had failed to adduce sufficient I evidence to support their claim that each one of them has made a greater financial contribution towards the purchase of the house than the other. What is clear is that the finance for the purchase of the house is largely sourced out from the fund and income generated from the family business in North Borneo Dive & Sea Sports Sdn Bhd.

[32] The evidence of the wife respondent that she had paid the booking deposit fee of RM1,000 from her own pocket money at the time when the husband petitioner was still in Austria is not supported by documentary evidence. In fact, none of the payment made towards the purchase of the house in the form of receipts was produced in court. I also find that her evidence that the booking deposit fee was paid on 29 April 2006 when the husband petitioner was in Austria is false as the whole family had returned back to Malaysia after staying in Austria for 15 months from October 2004 until December 2005.

[33] From the evidence adduced during the trial, the husband petitioner and the wife respondent were staying at Taman Suria house together with their children after it was purchased during the subsistence of the marriage until the husband petitioner left out from the said matrimonial home permanently sometime in 2017. Based on the case law authority mentioned above, when it relates to the matrimonial house, the court generally acknowledged that it falls under the matrimonial property, provided it was acquired by the joint efforts of the spouse though one spouse may not have contributed in cash but the consideration may have been in kind. The nexus appears to be the enjoyment and usage.

[34] In the present case, even assuming that the wife respondent has acquired the matrimonial house solely by her own efforts for the reason that she paid the booking deposit fee, it cannot be denied that both the husband petitioner and wife respondent were already married for almost 20 years and during that period the husband petitioner may have contributed in any kind for the court to lean in favour of dividing this asset on equal terms with alternative option within the parameters of justice and equity.

[35] In exercising my discretion and taking into account the welfare of the children of the family, I order both the husband petitioner and wife respondent are to transfer their 1/2 undivided shares each in the matrimonial house at Taman Suria to the children of the family. As the wife respondent is given the care and sole custody of the children, it would only be fair if she is allowed to remain in the house subject to the agreement of the children.

[36] In respect of the properties Lots B7 and B8 and Lots A5, A6 and A7, these properties according to the husband petitioner were rented out to North Borneo Dive & Sea Sports Sdn Bhd and Holiday Dive Inn Sdn Bhd respectively and the payments of the rental were utilised to service the bank loan monthly instalments. There is still an outstanding sum due to the bank for these five properties which will only be fully settled in 2023.

[37] These properties in particular Lots B7 and B8 were purchased in 2008

in the joint names of the husband petitioner and wife respondent during the subsistence of their marriage. Although the husband petitioner was only employed in North Borneo Dive & Sea Sports Sdn Bhd in September 2009 based on exh D7, from the evidence adduced in court, he was actually involved in the business in North Borneo Dive & Sea Sports Sdn Bhd much earlier which is evidenced from the allotment of the company's business shares of 30% by the wife respondent in 2006. It was also adduced by the husband petitioner that although he was employed by Sentosa Engineering Auto prior to that, he had all the freedom to work and contribute in the management and economic growth of North Borneo Dive & Sea Sports Sdn Bhd.

[38] The uncontroverted evidence of the husband petitioner is that he used his skills and experiences as a qualified engineer, a PADI course director, scuba diving instructor, scuba technician, resort manager, and marketing manager in developing and profiting the business of North Borneo Dive & Sea Sports Sdn Bhd.

[39] If the marriage relationship between the husband petitioner and the wife respondent had shown a sign of bleak future and that the husband petitioner had not played any role in the family business, why then these properties were registered in the joint names and the wife respondent was willing to transfer the business shares in the three companies namely, North Borneo Dive & Sea Sports, Holiday Dive Inn Sdn Bhd and Coco Beach Lodge Sdn Bhd to the husband petitioner. It was the wife respondent's own evidence that when she registered the properties in their joint names, she had the intention of letting the husband petitioner to hold the properties on trust for the benefits of the children of the family. What this means is that, had the wife respondent lost her trust and confidence in the ability and credibility of the husband petitioner to manage the companies, she would not have agreed for the joint names and the transfer of business shares.

[40] It was submitted by learned counsel for the wife respondent that their marriage relationship was already strained as early as September 2007 which I am not so persuaded because even after that period when the properties Lots B7 and B8 were purchased in 2008 they were still registered in their joint names which goes to show otherwise.

[41] The wife respondent alleged that when she transferred the business shares of 30% of the three companies to the husband petitioner, there were no considerations and she did that under the pressure from the husband petitioner. There was nothing further from the wife respondent to support her allegation of the pressure imposed upon her by the husband petitioner which the husband petitioner denied throughout. It was the husband petitioner's case that the 30% shares in North Borneo Dive & Sea Sports Sdn. Bhd was not a gift

to him by the wife respondent but it was arranged to fulfil the regulation requirement for tourism approval of the company based on an equal partnership.

[42] Further, I am of the view that the husband petitioner had a legitimate expectation on his right and interest over the properties when he was registered as the co-owner of the properties and entrusted by the wife respondent to manage the business of the companies especially the North Borneo Dive & Sea Sports Sdn Bhd. He had performed his duties based on his expertise towards the development of this company which led to the purchase of more properties generated from its profits and incomes.

[43] Again, even assuming that the business of North Borneo Dive & Sea Sports Sdn Bhd was set up from the brainchild of the wife respondent solely in 1998, it cannot be denied that the extensive roles and involvements of the husband petitioner who silently contributing in the manner alike ie helping, supporting, encouraging and giving ideas for the development of the family business during their companionship as husband and wife at the early stage of the marriage. This is a case where I took an opposite stand that behind every successful woman, there is a hand of a man behind her. In the present case, they both complement each other otherwise the business will not be as good as what it is today. The wife respondent could not be allowed to say with pride that all the success in her business venture is due to her sole efforts discrediting the sacrifice of the husband petitioner as her business partner.

[44] During re-examination, the husband petitioner testified that he and his father injected capital in the sum of ATS 50,000 (Austrian) to start the business of North Borneo Dive & Sea Sports Sdn Bhd. This court, however, ought not to consider this evidence for the reason as rightly submitted by learned counsel for the wife respondent that it was not pleaded and adduced during the examination in chief. The husband petitioner has also not produced any documentary evidence to support his claim. The same rules must be applied to the wife respondent when she testified that she utilised all her savings in the sum of RM25,000 as capital to set up North Borneo Dive & Sea Sports Sdn Bhd but no documentary evidence was produced during the trial.

[45] Having seriously considered the abovementioned, I am minded to allow the division of the properties in Lots B7 and B8 in proportion ie 40% for the husband petitioner and 60% for the wife respondent. As the properties are still under the loan facility, the just and equitable order would be for these properties to be sold and the proceeds are to be divided equally. The greater proportion is given to the wife respondent in the interest of the children of the family as the wife would be solely responsible to provide for the maintenance of the children.

[46] After delivering my oral ruling as per para 45 above on the 9 November 2018, Mr Hamid, learned counsel for the wife respondent through a letter dated 30 November 2018 wrote to the court seeking for the clarification of the said order. According to Mr Hamid's said letter, the husband petitioner should only be entitled to 30% shares, the wife respondent 60% shares and the remaining 10% shares should go to Dr Irwan Soo.

[47] I heard the request for the clarification on the 8 January 2019 wherein Mr Hamid submitted that since the two properties ie Lots B7 and B8 which formed the company's (North Borneo Dive & Sea Sports Sdn Bhd) properties and if these properties are to be sold off, all the shareholders of the company should be entitled of their own respective shares including Dr Irwan Soo's 10% shares even though he is not the registered owner of the properties.

[48] Puan Rosslin, learned counsel for the husband petitioner disagreed with Mr Hamid's proposition by submitting that both Lots B7 and B8 are the matrimonial assets jointly acquired by the husband petitioner and the wife respondent through a bank loan. She further submitted that the monthly instalment of the bank loan is paid by the company directly to the bank based on the rental agreement entered between the company on one part and the husband petitioner and wife respondent on the other part. As the company is merely renting the business premises belonged to the husband petitioner and wife respondent, Puan Rosslin submitted that the issue of the claim by Dr Irwan Soo over the proceeds of the sale of the properties Lots B7 and B8 should not arise at all. Having heard both parties, I said I would stick to my oral ruling and give my reasons in my grounds of decision.

[49] I am aware that Dr Irwan Soo has a share in the business of the company North Borneo Dive & Sea Sports Sdn Bhd and this is not disputed. By having a business share in the said company, this does not mean that Dr Irwan Soo is also deemed to be the owner of the properties. I agree with Pn Rosslin's contention that the company is actually renting the buildings (Lots B7 and B8) as premises for the business of the company. Hence the share of the business of the company should not be mixed up with the ownership of the premises. I maintained my earlier order that Lots B7 and B8 should be divided in the proportion of 60% and 40% between the wife respondent and the husband petitioner respectively. Upon the sale of the properties, its' proceeds should be divided based on the said proportion and not equally as I had inadvertently mentioned in my oral ruling.

[50] This is fortified by my further oral ruling that prior to the sale of Lots B7 and B8, the husband petitioner shall keep his 30% shares in the business share of North Borneo Dive & Sea Sports Sdn Bhd and he is therefore entitled to the profits and dividend generated from its business from time to

time. The other 60% business shares shall remain with the wife respondent and the 10% business shares remain with the Dr Irwan Soo.

[51] As regards to the claim of maintenance by the husband petitioner, I dismissed the claim as I am of the view that the husband petitioner is capable of maintaining and supporting himself as it is proven that he is currently managing his own company Mawali Adventure. With his wide experiences in professional diving and sea sports activities, I am confident that he would be able to find his own way in the industry. In any event, learned counsel for the husband petitioner did not submit widely on the issue of maintenance.

[52] In regard to one unit of motorcar Mitsubishi ASX bearing registration No ST882P, by consent of the wife respondent, the ownership of the same would be transferred to the husband petitioner.

[53] As husband petitioner is prepared to relinquish his right and interest over the rest of the properties in consideration that Taman Suria, Lots B7 and B8 and the business shares of North Borneo Dive & Sea Sports Sdn Bhd are to be transferred to him, I order as follows:

(a) the husband petitioner shall transfer his half shares in Lots A5, A6 and A7 to the children of the family. Likewise, the wife respondent shall also transfer her half shares in Lots A5, A6 and A7 to the children of the family. For Lots A5, A6 and A7 Semporna Seafront Resort Township, although these properties were in the joint names and purchased in 2008, there was no evidence of any contribution came from each party but it is not disputed that the main income of the family is generated from the business of North Borneo Dive & Sea Sports Sdn Bhd. So, I believe that the purchase of these properties is sourced out from the income of North Borneo Dive & Sea Sports Sdn Bhd;

(b) the husband petitioner shall also surrender his business shares in Holiday Dive Inn Sdn Bhd and Coco Beach lodge Sdn Bhd to the children of the family for their welfare and benefit. For these companies, the husband petitioner has 30% business shares each while the wife respondent has 70% business shares each. The evidence in regards to the business of these two companies was not given in details save that the wife respondent is the director of these companies. There was no evidence on the husband petitioner's role in these companies except that he held up the business shares in the companies and the business of Holiday Dive Inn is carried out in the premises of Lots A5, A6 and A7 registered jointly in the names of the husband petitioner and wife respondent. As mentioned in the beginning of this judgment that the wife respondent is also prepared to surrender her business share and assets of Holiday Dive Inn Sdn Bhd and her business share and assets in Cocoa Beach Lodge Sdn Bhd and in all

fairness, I order that the wife respondent to surrender her business shares in these two companies as well to the children of the family for their welfare and benefit;

(c) all the natives titles and TOL land under the wife respondent's name (paras 11(8), 11(9), 11(10) and 11(11) of the petition) shall remain in the name of the wife respondent for the benefits of the children of the family as there was no evidence laid by the husband petitioner to show that the said immovable properties were acquired by joint efforts except to say that the source of income to purchase these properties is from the business of North Borneo Dive & Sea Sports Sdn Bhd;

(d) the wife respondent remains the sole registered owner of Bintang Fairlane apartment in Kuala Lumpur (para 11(7)) of the petition as there was no evidence that the husband petitioner had contributed in any manner in the pre and post purchase of this apartment; and

(e) the two properties which were only revealed during the trial ie a land at Kpg Melinsung held under subsidiary title No 020520683 and a house at Mile 3, Apas Road, Tawau shall also remain in the name of the wife respondent as there was no evidence to show that the husband petitioner had contributed in any manner in the acquisition of these properties.

[54] Parties are to bear their own costs of this proceedings.

Order accordingly.

Reported by Mohd Kamarul Anwar